

ST 97-1

Tax Type: SALES TAX

Issue: Responsible Corp. Officer - Failure to File or Pay Tax

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS

THE DEPARTMENT OF REVENUE)	Docket #
OF THE STATE OF ILLINOIS)	
)	IBT #
v.)	NPL #
)	
TAXPAYER)	Barbara S. Rowe
Responsible Officer)	Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. Eldon H. Becker of Grosboll, Becker, Tice and Smith, attorney for the taxpayer

Synopsis:

This matter comes on for hearing pursuant to the protest of TAXPAYER, as a responsible officer of CORPORATION/ CORPORATION (the "Business" or "Corporation"), to Notice of Penalty Liability (the "NPL") number XXXX issued on April 25, 1989. The NPL represents the officer's liability for Retailer's Occupation Taxes, admitted due by the business to the Illinois Department of Revenue (the "Department"), but which remain unpaid.

A hearing in this matter was held on May 22, 1996. Following the submission of all evidence and a review of the record, it is recommended that this matter be resolved in favor of the taxpayer.

Findings of Fact:

1. The *prima facie* case of the Department consisting of the Notice of Penalty Liability was established by the admission into

evidence of Dept's Ex. No. 1. The liability was for Retailer's Occupation Taxes for the periods of September 1985 through December 1985 (for penalty and interest only) and March 1986, May 1986 through November 1986 (for tax, penalty and interest) in the amount of \$5,334.44. (Dept. Ex. No. 1)

2. CORPORATION was a tavern established in September 1985, that was run by TAXPAYER B. (Tr. p. 12)

3. CORPORATION was formed with money borrowed by TAXPAYER B from his mother. (Tr. p. 13)

4. As security for the loan of \$25,00.00, the amount needed to start the business, TAXPAYER B had all of the stock issued in the name of his mother, TAXPAYER. She was the president of the corporation. (Tr. pp. 11, 13, 15, 22-23; Dept. Ex. No. 5)

5. TAXPAYER is a housewife by profession. (Tr. p. 22)

6. TAXPAYER B ran the day-to-day operations of the business, did the hiring and firing of employees, purchased supplies, made bank deposits and took care of the book work. (Tr. pp. 15-16; Dept. Ex. No. 5)

7. TAXPAYER B hired TAXPAYER C to do the accounting for the business. TAXPAYER C is listed on the Department's returns as the accountant for the business. TAXPAYER C was responsible for preparing, filing and signing the tax returns. (Tr. pp. 13-14, 17; Dept. Ex. No. 4)

8. TAXPAYER C set up the corporation. The corporation never held corporate meetings nor did the corporation follow accepted corporate guidelines. The stock was issued in the name of TAXPAYER at the recommendation of TAXPAYER C. (Tr. pp. 18-19, 24)

9. TAXPAYER signed some tax returns in her capacity as president of the corporation. (Tr. p. 15; Dept. Ex. No. 4)

10. TAXPAYER gave the Department a payment of \$3,697.73 on May 15, 1986, for Retailers Occupation Tax liabilities for IBT # 1839-5163 for September 1985 through April 1986. The check was issued on her private checking account. (Dept. Ex. No. 4)

11. The business was involuntarily dissolved by the Office of the Secretary of State on January 2, 1987. The reason for the dissolution was that the business never made any money, nor were the annual reports filed or the franchise tax paid. (Tr. p. 13; Dept. Ex. Nos. 4, 5)

12. TAXPAYER became aware of the sales tax liability when she received the NPL in 1989. (Tr. pp. 30-31; Dept. Ex. No. 5)

13. The property upon which the tavern was located was purchased by TAXPAYER B pursuant to a contract for deed. It was eventually "turned back over to the original owner." (Tr. pp. 17, 20)

14. In total, TAXPAYER loaned her son approximately \$40,000.00 for the business. (Tr. p. 24)

Conclusions of Law:

The penalty at issue herein is based upon the Retailer's Occupation Tax Liability of CORPORATION for the periods of September through December 1985, March 1986, and May 1986 through November 1986. The business submitted the required returns without payment of the taxes stated therein. The Department seeks to impose a personal

liability penalty on TAXPAYER pursuant to Ill. Rev. Stat. 1985, ch. 120, para. 452½,¹ which provides:

§ 13½ Any officer or employee of any corporation subject to the provisions of this Act who has the control, supervision or responsibility of filing returns and making payment of the amount of tax herein imposed...and who willfully fails to file such return or to make such payment to the Department or willfully attempts in any other manner to evade or defeat the tax shall be personally liable to a penalty equal to the total amount of tax evaded, including interest and penalties thereon;...

There are two elements which are required by the statute in order for personal liability to be imposed for the failure to pay Retailer's Occupation Taxes. First, the person must be a responsible party and second, the failure to pay must be willful. By introducing the NPL into evidence, the Department has proven its *prima facie* case against TAXPAYER. The burden of proof then passes to TAXPAYER to rebut the *prima facie* case. See Branson v. Department of Revenue, 168 Ill.2d 247 (1995)

The corporation was formed so that TAXPAYER B could run a tavern. The funding for the business was supplied by his mother, TAXPAYER. TAXPAYER is a housewife by profession.

TAXPAYER was not involved in the day-to day operations of the business. She was not compensated by CORPORATION and, in fact, supplied almost \$40,000.00 so that her son could run the business. Although she signed some of the returns, it was in her capacity as

¹. The liability for Retailer's Occupation Taxes herein accrued in 1985 and 1986. Therefore the statute which applies is Ill. Rev. Stat. ch. 120, ¶ 452½. The Uniform Penalty and Interest Act, 35 ILCS 735/3-7, which provides for a personal liability penalty, is the replacement provision, effective for taxes incurred on January 1, 1994 and later.

the president of the corporation and as a co-signatory with TAXPAYER C, the accountant, and not as an active participant in the business. The only check that she submitted to the Department to cover taxes owed was on her personal checking account.

Corporate office, *per se* does not impose the duty to collect, account for and pay over Retailer's Occupation Taxes. The courts have stated that a president and sole officer of a corporation who admitted that he had the responsibility of approval of the preparation of the corporate books and records, and prepared and signed the sales tax returns established that he had the requisite control, supervision or responsibility to satisfy that element of the statutory test. See People ex rel. Department of Revenue v. National Liquors Empire, Inc., 157 Ill.App.3d 434 (1987)

The courts have also held that the willfulness element of the statute is found where the taxpayer fails to pay an amount due as reflected on the signed return and instead uses the corporate funds to pay creditors and the taxpayer plays a substantial role in the preparing and filing of the tax returns. "The Supreme Court has interpreted the term willful to mean 'voluntary, conscious and intentional failure to make a tax payment.'" Griffith v. Department of Revenue, 266 Ill.App.3d 838, 842 (1994) citing Department of Revenue v. Joseph Bublick & Sons, Inc., 68 Ill.2d 568, 577 (1977)

In Dept. of Revenue v. Marion Sopko, Inc., 84 Ill.App.3d 953 (1980), the Appellate Court found that the sole owner of a liquor store, over which the owner exercised exclusive control, had not willfully failed to file returns or make appropriate tax payments and

was not personally liable for the tax deficiencies. In Sopko, the owner, after receiving the notice of tax liability, immediately contacted the accountant who prepared the Retailer's Occupation Tax returns for the corporation and was assured by him that the matter would be taken care of. The owner assumed that the accountant had taken care of the problem and did not make a further inquiry as to the resolution of the problem. The Appellate Court held that the trial court's finding that the owner did not willfully fail to pay the taxes owed and was not personally liable for the taxes, interest and penalties owed by the corporation, was not against the manifest weight of the evidence.

TAXPAYER did not have the responsibility of preparing or keeping records for the corporation, nor did she have a substantial role in any part of the business. Rather, her only responsibility appears to be the "deep pocket" that her son could rely upon when he needed money for the business. I therefore find that TAXPAYER has rebutted the Department's *prima facie* case, and has demonstrated that she was not a responsible corporate employee or officer and did not willfully fail to pay the Retailer's Occupation Tax liability incurred by CORPORATION/ CORPORATION.

WHEREFORE, for the reasons stated above, it is recommended that the Notice of Penalty Liability number XXXX, issued against TAXPAYER, be disallowed.

Respectfully Submitted,

Barbara S. Rowe
Administrative Law Judge
January 6, 1997